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Federal Communications Commission
Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Policy Implications	)	MM Docket No. 91-221
of the Changing Video Marketplace	)	

COMMENTS OF CBS INC.

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SUMMARY OF COMMENTS OF CBS INC.

In little more than a decade, the video marketplace has been transformed. The rise of independent stations, the growth of a new network, the dramatic increase in cable penetration and channel capacity, and the emergence of videocassette recorders and other new technologies have meant an explosion of viewer choices and unprecedented marketplace competitiveness.

In this new environment, decades-old regulations intended to curb network power are not only an anachronism; they are effectively hobbling the networks, and other group owners, in their efforts to compete and survive.

As recently found by the Commission's Office of Plans and Policy, outmoded and unnecessary regulation leaves the networks and other broadcasters at a significant competitive disadvantage compared to cable and other formidable rivals in the video marketplace. In these Comments, CBS Inc. ("CBS") urges the Commission to take several steps to relieve networks and broadcasters of needless regulatory constraints.

Among these is the restriction on the number of television stations that may be commonly owned. As the Commission has recognized, joint station ownership can provide many significant public benefits through cost savings and operating efficiencies; enhanced news and programming capabilities; and an extension of skilled management to additional markets. Particularly in light of today's profusion of video outlets and alternatives, on both the national and local levels, the national multiple ownership rule cannot be said to serve any significant purpose.

Similarly, the Commission should relax its current prohibition on common ownership of television stations with overlapping Grade A service contours. The rule as it now exists is overly restrictive, given the abundance of local viewing options in most larger markets. A more flexible approach -- one which takes into account the particular characteristics of the market and the stations involved -- could permit the benefits of common ownership without significantly constricting viewer choices or market competitiveness.

CBS urges the Commission to reexamine its past decisions that impede the ability of networks to negotiate meaningful financial incentives for affliates to clear network programs. These decisions do not reflect the realities of the modern video marketplace. Nonetheless, they continue to dictate a compensation structure that artificially biases clearance decisions against networks. This bias reduces the advertising base available to support free television, thus undercutting free television's ability to compete against subscriber-supported alternatives. A market freed of this regulatory intervention would permit the distribution of network and syndicated programming to occur with far greater efficiency, thus conferring more rational parameters on the entire broadcast industry.

CBS also urges the Commssion to repeal that portion of the prime time access rule that bars top 50 market affilates from broadcasting off-network programming during the "access" time period. CBS does not challenge the prime time access rule's limitation of network entertainment programming to three hours nightly. The rule's off-network restriction, however, pointlessly curtails the ability of the effected affiliates to compete for viewers during their "access" periods. It also directly disadvantages broadcast networks by depressing the "after-market" value of network series, making such series more expensive for networks to license from producers. In this way, the rule biases the programming market against the established broadcast television networks and in favor of cable networks and new television networks such as Fox, whose programming is not burdened with the "off-network" brand.

Finally, and most important, CBS urges the Commission to again recommend to Congress, as it did last year, enactment of a retransmission consent system governing cable carriage of broadcast signals. As the Commission has recognized, the current scheme, under which cable appropriates broadcast programming at minimal cost under a compulsory license, creates a profound competitive imbalance. Indeed, the current system effectively compels broadcasters to subsidize the growth and popularity of their cable competition. The Commission should recommend again that broadcasters be permitted to negotiate the terms under which their signals may be retransmitted by cable operators.

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COMMENTS OF CBS INC.

CBS Inc. ("CBS"), by its attorneys, hereby submits its comments in response to the Commission's August 7, 1991 Notice of Inquiry, FCC 91-215 ("Notice"), in which the Commission solicited "wide-ranging comments on changes in the video marketplace" and expressed its concern that "some of [the Commission's] rules and policies may no longer be in step with current industry circumstances... ." Id. at ¶1.

INTRODUCTION

The focus of the Notice is an exhaustive staff study of the current and projected state of the video marketplace[1/] and the regulatory implications which flow from the conclusions of that study. Those conclusions,

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1/ Office of Plans and Policy Working Paper #26. Broadcast Television in a Multichannel Marketplace, DA 91-817, 6 FCC Rcd 3996 (1991) ("OPP Working Paper").

which are summarized in the Notice and which are part of the record in this proceeding, need not be repeated in detail here. Suffice it to say at the outset that in CBS's view the OPP Report is correct in predicting "intensified competition as alternative media, financed not only by advertising but also by subscription revenues, and offering multiple channels of programming, expand their reach and their audience."[2/] It also correctly notes that the "broadcast networks and their affiliates have been the big losers" in this competition so far.[3/] And it correctly concludes that "[v]iewers who do not subscribe to cable or other multichannel media will be made worse off by a decline in the quantity and quality of broadcast service."[4/]

CBS agrees that there are grave difficulties ahead for the free broadcasting industry -- and for its audience -- if it must continue to compete with multichannel pay services while remaining subject to an outdated regulatory structure. CBS welcomes this inquiry, and hopes that the Commission will review the record of this proceeding and any ensuing rulemaking proceedings with a focused determination to

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2/ OPP Working Paper at vii.

3/ OPP Working Paper at viii.

4/ OPP Working Paper at x.

eliminate outdated regulations and thus help to ensure the survival and the health of over-the-air broadcasting.5/

The special perspective which CBS brings to this proceeding is that of a television network company which has not hedged its bets by diversifying into nonbroadcast media businesses. Rather, this company is continuing to invest its undivided attention, energies and resources in broadcasting, and in the strengthening and rationalizing of the network/affiliate system so that that system can remain successful in the rapidly changing media environment. The Commission's Notice is in substance an open-ended invitation to commenters to call into question any and all rules and policies which may adversely affect the ability of free television to survive and thrive. In light of the unique perspective we bring to this proceeding, however, we will focus below on those issues which we believe most directly

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5/ Because it is obviously relevant to this proceeding, CBS notes its continued belief that the Commission failed to give appropriate weight to, among other things, the changes in the competitive environment in its recent decision modifying the financial interest and syndication rules. Syndication and Financial Interest Rules, 6 FCC Rcd 3094 (1991). While it would serve no useful purpose to reargue the substance of those issues here, we note that the record in that proceeding contains abundant evidence of both the current competitive state of the video marketplace and the networks' declining position in that marketplace.

affect network television broadcasting -- leaving aside the financial interest and syndication rules that have been the subject of a separate reexamination by the Commission.

The unique partnership between national broadcast networks and their local affiliates has produced a blend of universally available programming which responds both to the needs and interests of more than 200 local communities and to the needs and interests of the nation as a whole. For decades, free network television has informed and united this nation in a way no pay medium can.

The special ability of broadcast networks to bring news and information to virtually every American home -- simultaneously and without cost to the viewer -- has contributed immeasurably to national awareness of the issues and events of our time. In newscasts, documentaries, and news magazines, and in special extended coverage of pivotal events, broadcast network news remains the medium most relied on by the American public for information about the country and the world in which they live -- including especially the approximately 40 percent of Americans who cannot or do not subscribe to cable. Without belaboring the point, CBS wishes to affirm that even in these difficult economic times for broadcast networks, we take very seriously the responsibility that goes with our historical newsgathering and distribution role.

In addition, of course, network television also offers the public the very real benefit of free, universally available high-quality entertainment programming and coverage of premier sporting events. From I LOVE LUCY to MURPHY BROWN, Super Bowls to World Series games to Olympic coverage, network television has offered virtually every American a front-row seat, free of charge, to shows and sports contests that have entertained and thrilled a nation.

No cable outlet or other pay medium could fill the networks' traditional role in binding and informing an entire country, across geographic and economic lines. And yet, government regulation works to handicap the networks in performing precisely these functions. By limiting the efficient growth and operation of network companies, such regulation chokes their ability to compete for national programming rights with their unregulated subscription-based competitors. Ultimately, unless this outmoded and stifling regulatory scheme is reformed, networks will simply be unable to afford to present high-quality news, entertainment, and sports. Such programming, to the extent it is available, will be found only on cable and other pay media. The public, in other words, would quite literally be forced to pay the price.

We note also that the fortunes of local affiliated stations -- and their ability to serve the needs and interests of their communities -- are inextricably entwined with the health of the networks with which they are associated. The more successful the network, the more successful the affiliate -- and the better able to channel resources into news, public affairs, and other community-based programming and services. Conversely, regulations which sap the competitive viability of the networks also do inevitable harm to the owned stations and affiliates which the network serves.

In CBS's view, the first group of rules which should be revisited are the ownership limitations -- especially the national multiple ownership rule - - which inhibit broadcasters' ability to take advantage of efficiencies that careful, well-planned expansion of station groups can provide. Although the rationale for removing unnecessary and arbitrary restrictions on growth leads us to question, as we have in prior proceedings, the wisdom of the network/cable cross-ownership rule and other restrictions on diversification into nonbroadcast media businesses, our emphasis here will remain on restrictions that adversely affect our core business.

Group ownership is vital to a television network. For reasons the Commission well understands, a stable, well-run group of large market outlets is essential to justify the extraordinary financial risk of compiling a high-quality network program schedule and the maintenance of a full-scale news operation. In order to succeed in the present and future media environment of reduced audiences and profit margins, while cable operators are unencumbered by limitations on vertical integration and by national ownership rules, network companies need relief from structural regulations that no longer serve any good purpose. We need to be able to grow naturally and efficiently in local, regional and national markets without the constraint of regulations based on an outmoded notion of economic concentration, and on a policy goal of expanding viewer choices that has now been realized by technology to a degree unimaginable 10 or 15 years ago.

A second group of rules which should be examined in light of competitive realities are those affecting the business relationship between networks and affiliates. The ancient "chain broadcasting rules," which still significantly govern this relationship, are grounded at least in part on the inviolable right and obligation of network affiliates to select programming based on public interest considerations applicable to their local communities. One of the results of this regulatory scheme, however, is unnecessarily harsh restraint on the ability of networks and their affiliates to negotiate reasonable financial incentives for affiliates to clear network programs. As discussed below, the majority of affiliate preemption decisions are purely economic ones. To the extent that networks are better able to compete economically for access to affiliates' schedules on equal terms with other programming sources, both the network and the affiliate benefit, without compromising the public interest in vesting in local stations the ultimate responsibility to serve their communities in a manner consistent with the public interest.

CBS believes that a third important focus for inquiry should be the "off-network" restriction of the prime time access rule. Our purpose here is not to challenge PTAR's core limitation on network hours in prime time; we have no wish to present more than three hours of prime time entertainment programming a night. However, the "off-network" restriction of the rule is, in our view, a prime example of outdated regulation which disadvantages broadcast networks and affiliates while serving no useful purpose. The restriction biases the competitive marketplace for advertising revenue and viewers against the top-50 market affiliates subject to the rule, and in favor of independent stations, Fox network affilates, and cable channels which are able to carry "off-network" programming in prime time without limitation. At the same time, it directly disadvantages broadcast networks by tending to drive up the price (or drive down the quality) of prime time network programming, since it depresses the value of the "after-market" (i.e., syndication) portion of the total package of rights which the producer seeks to exploit.

Finally, we urge the Commission to lend its unequivocal support to bills pending in the Congress which would establish a retransmission consent approach to cable carriage of broadcast signals. Enabling local broadcast stations to negotiate for the terms under which their signals may be retransmitted by their cable rivals is of central importance to the continued competitive vitality of free television. Indeed, establishing such a scheme may be the single most important step which could be taken to permit the continuing viability of free television, both by promoting an additional revenue source for over-the-air broadcasters and by eliminating the existing government-imposed subsidy of the cable industry by broadcasters. With legislative reform in this area, and the regulatory relief we urge in these Comments, we are confident that broadcasting will be able to compete effectively in the video marketplace and continue to provide first-quality news, sports, and entertainment programming free of change, to all Americans.

I. RESTRICTIONS ON JOINT OWNERSHIP OF TELEVISION STATIONS SHOULD BE RELAXED IN LIGHT OF THE DRAMATIC INCREASES IN THE NUMBER OF TELEVISION SOURCES AND COMPETITIVENESS OF THE TELEVISION MARKETPLACE.

A. The National Multiple Ownership Limits Should Be Eliminated.

Commission regulations limiting the total number of stations under joint ownership date back to the 1940's. The historical purpose of these national multiple ownership rules has been to promote viewpoint diversity and to avoid undue concentration of economic power. See gen. Multiple Ownership Rules, 100 F.C.C.2d 17, 20-23 (1984).

In 1984, following a comprehensive review of the multiple ownership rules, the Commission concluded that changed technology and market conditions had rendered the rules unnecessary. Id. at 18-20. Moreover, the Commission found that the rules actually disserved the public by impeding the realization of economies of scale and other benefits of group ownership. Id. On this basis, the Commission decided to increase the maximum number of jointly owned television stations from seven to 12 for a transitional six-year period, after which the rule would be eliminated entirely. Id. On reconsideration, the Commission removed the automatic sunset, but reaffirmed its fundamental conclusion that "the total elimination of a presumptive national ownership rule would benefit the public interest....[and] would not contravene our traditional policy objectives of promoting diversity and preventing undue economic concentration." Multiple Ownership (Reconsideration), 100 F.C.C.2d 74, 97 (1985).6/

The case for repeal of the multiple ownership rules is even more compelling today than it was seven years ago. The marketplace changes identified by the Commission in 1984 have continued and accelerated, further diminishing any justification for retention of the rules and increasing the need for their removal. In the discussion below, we consider the traditional purposes of the multiple ownership rules -- viewpoint diversity and economic competition -- and the benefits which may be realized from group ownership of television stations.

1. Viewpoint Diversity

The diversity of media viewpoints available in any community is a function of the number of media outlets in

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6/ The Commission on reconsideration also established an audience reach cap for jointly owned stations of 25 percent of television households. Id.

that market. Whether or not those outlets are jointly owned with outlets in other markets does not affect the diversity of viewpoints available to that community. Accordingly, as the Commission observed in 1984, "a national [multiple ownership] rule is irrelevant to the number of diverse viewpoints in any particular community." Multiple Ownership, 100 F.C.C.2d at 25. As the Commission also suggested, the relevant market for viewpoint or programming diversity should encompass a whole range of sources of information and ideas, including not only broadcast television but also cable, radio, newspapers, magazines, videocassettes, books, and other sources. Id. at 25-26.

Viewed on either a national or a local level, the number and diversity of media sources available to the American public is astounding. This is true even if one focuses only on television. The "explosion" of television alternatives discussed by the Commission in 1984 has continued, spurred by the continuing increase in independent stations, the powerful growth of cable, and the rapid proliferation of videocassette recorders (VCR's).

The number of television stations on the air is now 1,684, triple the number in 1960, double the number in

1969, and 27 percent higher than 1984.[7/] More than half of all households receive 10 or more over-the-air television signals, up from 36 percent in 1984 and 21 percent in 1975.[8/]

At the same time, more than 91 percent of American television households are now passed by cable, up from 76 percent in 1985.[9/] Roughly 60 percent of television households subscribe to cable, compared to a 1985 figure of 43 percent.[10/] Cable channel capacity has also grown dramatically in the last six years, with 89 percent of cable subscribers receiving 30 or more channels in 1990, compared to 64 percent in 1985 and 49 percent in 1983.[11/] With increasing channel capacity and subscription have come a concomitant increase in cable programming sources, including basic and regional networks, pay cable services, and pay-per-view. More than 130 national and regional

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7/ Broadcasting, November 4, 1991 at 75; Television and Cable Factbook 1990 at C-323.

8/ OPP Working Paper at 18.

9/ Id. at 68.

10/ Id. at 70, 68.

11/ Id. at 84-85.

cable networks and services were available in 1990, up from 75 in 1983.[12/]

In addition, VCR's are now in more than 69 percent of television households, up from 21 percent in 1985.[13/] The presence of a VCR increases a household's programming options in several ways: by permitting taping of programs that would otherwise be missed because of their scheduling or conflict with another program, and by allowing access to literally thousands of videocassettes -- movies, documentaries, sporting events, and other entertainment and non-entertainment programming -- available for purchase or rent.[14/]

Whether one considers news, entertainment, or sports programming, the alternatives available to the public through broadcast television and cable have increased substantially since 1984. Given the tremendous abundance of television and media outlets, there is even less reason now than in 1984 to believe that restrictions on national

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12/ Id. at 76; Cablevision, October 31, 1983, at 150. See gen. id. at 143-55.

13/ Id. at 106.

14/ Id. at 105.

ownership are necessary to preserve diversity in viewpoint or programming.

Finally, it is worth noting again -- as the Commission did in 1984 -- that group ownership does not mean that jointly owned stations speak with one voice. To the contrary, it remains the general practice of group-owned stations to exercise substantial local autonomy over non-network programming choices and, in particular, over local news operations. See Multiple Ownership, 100 F.C.C. 2d at 34.

The CBS Owned television stations, for example, differ significantly in their non-network programming. Indeed, each occasionally preempts the network to present programming of special local interest, including news and public affairs specials. Each has an independent local newsroom and news operations.

Moreover, as the Commission observed in 1984, group-owned stations have tended to do "a superior job of responding to viewer demand for news," id. at 31, as compared to individually owned stations, with stronger commitments to news and public service.[15/] Again, this demonstrates the tendency of group and network station ownership to "enhance the information and entertainment markets by increasing the amount of local news and public affairs programming." Id.

2. Economic Competition

As dramatic as the proliferation of the number of television outlets has been the increase in the competitiveness of the television marketplace. As the OPP Working Paper describes in detail, the television market has become intensely competitive, whether measured by audience size or by advertising revenues.

15/ In addition to network programs like CBS THIS MORNING, CBS EVENING NEWS, 60 MINUTES, 48 HOURS, SUNDAY MORNING, and FACE THE NATION, each of the five CBS owned television stations presents from 10 to 25 hours of regularly scheduled local news and public affairs programs every week. This includes both daily newscasts and weekly series such as NEWSMAKERS, TROUBLESHOOTER, 2 THE POINT, and TODAY'S RELIGION (KCBS-TV, Los Angeles); COMMON GROUND, NEWSMAKERS, and DIFFERENT DRUMMERS (WBBM-TV, Chicago); CHANNEL 10: THE PEOPLE, OVER 50, and HORIZONS (WCAU-TV, Philadelphia); SUNDAY EDITION and CHANNEL 2: THE PEOPLE (WCBS-TV, New York); and INSIGHT and THE MIAMI RELIGION DISCUSSION (WCIX, Miami). The stations also present locally produced news and public affairs specials and public service announcements.

The combined shares of audience and revenues of the three major networks -- CBS, ABC, and NBC -- have declined steadily through the last decade. The three-network share of the prime time audience, for example, has dropped from 93 percent in 1975 to 64 in 1990.[16/] During the same period, aggregate audience shares of non-network stations (especially those affiliated with the Fox network) and cable increased sharply.[17/]

Similarly, advertising revenues among the three major networks declined from 44 percent of all television advertising in 1975 to 33 percent in 1990.[18/] Again, advertising shares for independent and Fox-affiliated stations and for cable increased substantially during that period.[19/]

Whether measured by audience share or advertising revenues, the television market is significantly more competitive and less concentrated than it was in 1984. At that time, the Commission concluded that "even putting to

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16/ OPP Working Paper at 25.

17/ Id. at 28.

18/ Id. at 116.

19/ Id.

one side the alternative video and other mass media, it is clear that there is no undue economic concentration for TV alone." Multiple Ownership, 100 F.C.C.2d at 42. That conclusion is all the more powerful today, as the traditional strength of the television networks and their owned and affiliated stations continues to erode, and the market power of independent stations, cable, and a fourth network (Fox) continues to grow.

3. Benefits of Repeal

In 1984, the Commission observed that elimination of the multiple ownership rules could allow group-owned television stations "to exploit important efficiencies." Multiple Ownership, 100 F.C.C.2d at 44. The same holds true today. Indeed, an increasingly competitive marketplace, and a significant slowing in the growth of advertising revenues, make the realization of these efficiencies all the more important for the continued health and vitality of broadcast television.

As the Commission noted in 1984, group ownership presents the opportunity for cost savings through the sharing of certain services and other economies. Id. at 45. Thus, for example, the CBS owned stations realize